National Constitutionalism

An Originalist and Structuralist Analysis of Border Policy, Immigration and Naturalization Law, and the Fourteenth Amendment

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Introduction

This paper proposes that constitutional governance relies upon several structural principles and implicit assumptions—rooted in our national history and the Constitution's text—about the significance of "We the People" in the constitutional scheme. This descriptive claim, coupled with a normative claim that these principles and assumptions should be preserved and aggressively asserted, is termed "national constitutionalism." National constitutionalism posits that, regardless of certain textual provisions with a seemingly open-ended scope of application, the Constitution's establishment of a nation-state under the sovereignty of the People must be considered its paramount purpose which may not be permissibly undermined by any governmental acts or omissions absent the direct and unambiguous consent of the People.[1] Originalism's two dominant varieties—original

[1] In this discussion, the phrase "the People" will be understood as being coterminous with the phrase "the nation." *See* AZAR GAT WITH ALEXANDER YAKOBSON, NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM 18 (2012) (defining "nation" as a population with a sense of shared kinship, culture, common identity, history, and fate, that is either politically sovereign or actively striving to achieve political self-determination and self-government); CARL SCHMITT, CONSTITUTIONAL THEORY 127 (Jeffrey Seitzer, ed. & trans., 2008) (noting that "[n]ation and people are often treated as equivalent concepts" but that "[nation] denotes, specifically, the people as a unity capable of political action, . . . while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but it is not necessarily a bonding of men existing politically").

intent originalism and original public meaning originalism[2]—both suggest the propriety of applying national constitutionalism to at least one area of law where courts have heretofore been inclined to view the so-called "political branches" (i.e., Congress and President) as possessing plenary, nonjusticiable authority: immigration and naturalization policy.[3] Additionally, the logic of national constitutionalism suggests an urgent need to overturn much of the Court's modern Fourteenth Amendment jurisprudence, and even consider the constitutionality of the Fourteenth (and Fifteenth) Amendments entirely.

The Originalist Foundations of National Constitutionalism

Original intent originalism "holds that the intent of the author of words or language determines the meaning of those words."[4] Original intent originalists defend this exegetical method by arguing that the true meaning of any authored language is inseparable from the author's intent.[5] McGinnis & Rappaport contend that original intent originalism's advantages are non-availing when the language at issue has multiple authors because "the individual intentions of each author might differ" and it is possible that "a single meaning was shared only by a plurality."[6] Moreover, this interpretive problem is compounded when the language's meaning is unexplained by the authors and where "legislators cannot easily determine the meaning of a provision upon which they are voting."[7] Nonetheless, McGinnis & Rappaport argue that these problems are resolvable via careful application of "background interpretive rules."[8] While McGinnis & Rappaport are correct that recourse to these rules may be useful and appropriate where no easily discernible, express consensus exists regarding the original meaning of multi-authorial language,

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[2] John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758 (2009) (describing these two varieties as "the two leading positive theories" of originalist interpretation).

[3] *See, e.g.*, California v. United States, 104 F.3d 1086, 1090–91 (9th Cir. 1997) (holding that California's plea for relief under the Guarantee Clause due to the federal government's failure to secure the southern border "presents a nonjusticiable political question" by noting that "[t]he Supreme Court has held that the political branches have plenary powers over immigration" and explaining further that "[f]or this Court to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective non-judicial policy decision") (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[4] McGinnis & Rappaport, *supra* note 2.

[5] *Id.* at 759 (recounting that "[Richard Kay] argues that readers do not understand texts independently of real or presumed human intentions . . . [r]ather, meaning is fundamentally connected with a human agent who intended to communicate something").

[6] *Id.*

[7] *Id.* at 760.

[8] *Id.* ("The possibility of multiple meanings would be significantly reduced or eliminated if legislators understood that the words of a law would be interpreted in accordance with applicable rules, such as accepted word meanings, grammar, and interpretive rules.").

these rules are less necessary (if not superfluous and potentially obfuscatory) where the language's meaning was clearly expressed when authored and there was a unanimous, or at least clear majority, agreement regarding this meaning.

In contrast to original intent originalism's subjective, authorial-based analysis, original public meaning originalism focuses on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment."[9] Thus, this method may be considered an objective mode of analysis, albeit one tied to the historical context of the language's genesis. Citing Barnett's analogy of the Constitution as a contract, McGinnis & Rappaport argue that their reliance on background interpretive rules is apropos because the objective theory of contract interpretation relies on the objective meaning of words rather than parties' subjective intentions.[10] McGinnis & Rappaport note that although many contractual terms are interpreted according to their ordinary meaning, "it is a legal interpretive rule that determines whether a term should receive its ordinary or legal meaning."[11] However, it is self-evident that where there is no difference between the ordinary meaning of language and its legal meaning, recourse to such a legal interpretive rule is unnecessary.

Like Vermeule's theory of common-good constitutionalism, national constitutionalism looks to the Preamble to clarify the Constitution's *raison d'être*. However, rather than look as Vermeule does to the Preamble's "sweeping generalities and famous ambiguities" to assert that the Constitution may be given a moralistic, anti-libertarian reading that permits the legislation of conservative morality,[12] national constitutionalism instead focuses on the Preamble's clear statement of who has "ordain[ed] and establish[ed]" the constitutional contract ("We the People") and who are its intended beneficiaries ("ourselves and our Posterity").[13] In doing so, national constitutionalism insists upon the conceptual validity of the principal-agent analogy in order to clearly delineate the People as the sovereign constituent power within the constitutional hierarchy, with the constituted power of the Constitution and its branches of government occupying an inferior, subordinate rule.[14] Thus,

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[9] *Id.* at 761.

[10] *Id.* at 762 (citing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 100 (2004)).

[11] *Id.* at 763.

[12] Adrian Vermeule, *Beyond Originalism*, The Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (arguing that "the Constitution's preamble, with its references to general welfare and domestic tranquility, to the perfection of the union, and to justice" is "an obvious place to ground principles of common-good constitutionalism," and that "words such as *freedom* and *liberty* need not be given libertarian readings; instead they can be read in light of a better conception of liberty as the natural human capacity to act in accordance with reasoned morality") (emphasis in original).

[13] U.S. CONST. pmbl.

[14] *See* Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 658 ("Those who conceptualize constitutionalism as a form of contracting describe the people as a 'principle,' which, in creating a representative government, has employed 'agents' to better realize its ends."); Luigi Corrias, *Populism in a Constitutional* Key, 12 EUR. CONST. L. REV. 6, 15 (2016) (describing the nation as the "bearer" of

national constitutionalism applauds and emphasizes the Supreme Court's long-held and oft-repeated acknowledgement of popular sovereignty as forming the bedrock of—and pre-dating[15]—the present constitutional order.[16]

Crucially, national constitutionalism rests in large part upon an originalist analysis of the meaning of the phrase "the People." The theory posits that although the People were an identifiable entity capable of political action prior to the ratification of the Constitution, the ratification process itself—and the political advocacy which propelled ratification forward—produced the controlling definition of the People for the purposes of constitutional interpretation. Like America's earliest jurists, national constitutionalists must look to The Federalist for guidance in clearly formulating this definition.[17] Those expounding national constitutionalism may take pride in the fact that they need not look long therein to find relevant authority. In The Federalist No. 2, John Jay explains that the Americans are:

> [A] people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout

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constituent power, whereas "the constitution, legislature, executive, and judiciary" which "ultimately derive their power from the nation" are the constituted power).

[15] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("it is the Right of the People to alter or to abolish [government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

[16] *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 470–71 (1793) (""[T]he people, in their collective and national capacity, established the present Constitution . . . in establishing it, the people exercised their own rights, and their own proper sovereignty"); Marbury v. Madison, 5 U.S. 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."); Barron v. City of Baltimore, 32 U.S. 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves, for their own government . . . The people . . . framed such a government . . . as they supposed best adapted to their situation and best calculated to promote their interests."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936) ("[T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks."); Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (relying on the presumption that the United States is "a republic where the people are sovereign"); Gamble v. United States, 587 U.S. 678, 688 (2019) ("[O]ur Constitution rests on the principle that the people are sovereign").

[17] Cohens v. Virginia, 19 U.S. 264, 418 (1821) (Marshall, C.J.) (noting that "[t]he opinion of the *Federalist* has always been considered as of great authority" in part because "the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed").

> a long and bloody war, have nobly established general liberty and independence.[18]

In The Federalist No. 14, James Madison placed particular emphasis on the People's common ancestry and shared experience of enduring and emerging triumphant from the recent revolutionary struggle, arguing that "the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union, and excite horror at the idea of their becoming aliens, rivals, enemies."[19] Furthermore, Madison called upon Americans to "[h]earken not to the unnatural voice which tells you that [Americans], knit together as they are by so many cords of affection, can no longer live together as members of the same family; . . . [and] can no longer be fellow citizens of one great, respectable, and flourishing empire."[20] The authors of The Federalist were not ashamed in asserting that the People possessed an exclusive, ancestral identity which should be jealously guarded. Indeed, they believed that it was a fundamental aspect of "human nature . . . that its affections are commonly weak in proportion to the distance or diffusiveness of the object;" and thus, "a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large."[21] Not only was a political union necessary in order to prevent "a band of brethren, united to each other by the strongest ties" from being "split into a number of unsocial, jealous, and alien sovereignties," but it was those "strongest ties" which made union possible in the first place.[22] The American nation served as the foundation of the American state, and the state, in turn, functioned to preserve what Schmitt would later call the "substantial equality" or "homogeneity" of the nation.[23] Given such views, the authors of The

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[18] THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961). *See also id.* at 38–39 ("To all general purposes we have uniformly been one people . . . As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states.").

[19] THE FEDERALIST NO. 14, at 104 (James Madison) (Clinton Rossiter ed., 1961).

[20] *Id.* at 103–104.

[21] THE FEDERALIST NO. 17, at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[22] THE FEDERALIST NO. 2, *supra* note 18, at 38.

[23] SCHMITT, *supra* note 1, at 258–59 (arguing that "[p]olitical democracy . . . cannot rest on the inability to distinguish among persons," but can only survive "on the quality of belonging to a *particular people*. This quality of belonging to a people can be defined by very different elements (ideas of common race, belief, common destiny, and tradition). The *equality* . . . thus orients itself *internally*" and when such a democracy produces a state wherein citizens possess equal rights and obligations "democratic equality is a *substantial equality*.") (emphasis in original). *See also* Heiner Bielefeldt, *Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 23, 27 (David Dyzenhaus ed., 1998) ("What ultimately counts in a genuine democracy, [Schmitt] says, is the sovereign authority of the collective unity of the people, a unity facilitated by, and resting on, some sort of 'substantial homogeneity.'"); ALAN GIBSON, INTERPRETING THE FOUNDING 62–63 (2006) (describing how "the concept of federalism within American republicanism retained a substantial residue of the belief that the republican form of government could exist only . . . with a homogeneous . . . citizenry" and "stress on a homogeneous citizenry also was used to promote restrictive naturalization policies").

Federalist were clearly nationalists.[24] Thus, under original intent originalism's subjective, authorial-based mode of analysis, the phrase "the People" and the Preamble's reference to "ourselves and our Posterity" (with "ourselves" plainly being synonymous with "the People" and " our Posterity" being the posterity of "the People") must be viewed through a nationalist lens.

The homogenous nature of the People was also clearly understood by the contemporaries of Jay, Madison, and Hamilton. In explaining his optimism regarding the prospect of enduring union, John Dickinson pointed to the fact that "the people were so drawn together by religion, blood, language, manners and customs, undisturbed by former feuds or prejudices."[25] Other Founders were explicit in framing the common ancestry and blood of the People as a racial matter. In the debate over the slave trade during the constitutional convention of 1787, Roger Sherman opposed the introduction of African slaves into the United States on the grounds that Black slaves "prevent the emigration of whites, who really enrich and strengthen a country."[26] Charles Pinckney, in the 1821 congressional debate on the Missouri compromise, clarified through his interpretation of the meaning of the Article IV Privileges and Immunities Clause,[27] which he claimed to have written, that:

> [A]t the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could ever have existed in it; nor . . . do I now believe one does exist in it . . .[28]

Pinckney went on to explain that belonging to the White race was an enduring prerequisite for becoming an American citizen.[29] Perhaps no one more unambiguously asserted that the nation was unalterably monoracial than Thomas Jefferson. Jefferson claimed to support abolition but believed that Blacks could not

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[24] *See supra* note 1 (explaining how "the People" and "the nation" are coterminous phrases).

[25] *See* John Dickinson, *"Fabius" [John Dickinson] The Letters: VII–IX*, *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788 492 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

[26] *The Debate in the Convention of 1787 on the Prohibition of the Slave Trade*, N.Y. TIMES ARCHIVE (Nov. 24, 1860), https://www.nytimes.com/1860/11/24/archives/the-debate-in-the-convention-of-1787-on-the-prohibition-of-the.html.

[27] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[28] 37 ANNALS OF CONG. 1134 (Gales and Seaton, 1855) (Feb. 13, 1821) (statement of Rep. Charles Pinckney).

[29] *Id.* at 1134–35.

be made citizens due to the risk of interracial conflict[30] and miscegenation.[31] It was Jefferson's dream to see the United States "cover the whole Northern, if not the Southern continent with a people speaking the same language, governed in similar forms, & by similar laws" and he could not "contemplate, with satisfaction, either blot or mixture on that surface."[32] That Jefferson was associated with the Anti-Federalists[33] further supports the proposition that the exclusive, racial nature of the People was the consensus viewpoint among the founding generation, regardless of their political leanings or partisan affiliation.[34]

Of the commonalities between Americans Jay observed in The Federalist No. 2, clearly the most important to the founding generation was the fact that Americans shared a common ancestral heritage. Furthermore, the Founders strongly believed Americans must continue to share that common ancestral heritage. To that end, before the ratification of the Bill of Rights, the first Congress passed the 1790 Naturalization Act which limited naturalization to "any alien, being a free white person, who . . . is a person of good character" upon their "taking the oath or affirmation prescribed by law, to support the constitution of the United States."[35] That act was promptly passed and signed into law pursuant to Congress' constitutionally granted power to "establish a uniform Rule of Naturalization."[36] The Founders acknowledged immigration was needed to grow America's population, expand her frontiers, and burgeon her power. Indeed, one of the grievances outlined in the Declaration of Independence was that the Crown prevented the "population of

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[30] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 145 (Frank Shuffelton, ed., Penguin Books 1999) (1785) (arguing that Blacks could not be made citizens because White prejudice and "ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race").

[31] *Id.* at 151 ("Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.").

[32] Letter from Thomas Jefferson to James Monroe (Nov. 24, 1801), *in* 35 THE PAPERS OF THOMAS JEFFERSON, Aug. 1–Nov. 30, 1801, at 718 (Barbara B. Oberg, ed., Princeton University Press 2008), https://founders.archives.gov/documents/Jefferson/01-35-02-0550.

[33] *But see* Michael J. Faber, *Thomas Jefferson, Federalist*, 128 VA. MAG. HIST. & BIOGRAPHY 282, 283 (2020) (acknowledging that "[b]ecause Jefferson advocated adding a bill of rights to the proposed Constitution, and because he later became the chief figure in the opposition party in the 1790s, he is easy to mistake for an Anti-Federalist. He is often identified as such in history textbooks and other places;" but nonetheless arguing that "Jefferson, though he had his doubts, clearly and unequivocally favored ratification of the Constitution. His position offers considerable insight into the Federalist position.").

[34] *See also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 138 (1997) (describing the Federalists as "the champions of . . . nativism" and the Jeffersonians as "the defenders . . . of aggressive civic racism").

[35] Naturalization Act of 1790, ch. 3, 1 Stat. 103.

[36] U.S. CONST. art. I, § 8, cl. 4.

these States" by obstructing immigration and failing to pass "Laws for Naturalization of Foreigners."[37]

However, the Founders did not believe immigration should be unconstrained. In 1802 Alexander Hamilton wrote that "foreigners will generally be apt to bring with them attachments to the persons they have left behind; to the country of their nativity, and to its particular customs and manners" and may not possess "that temperate love of liberty, so essential to real republicanism."[38] Moreover, Hamilton expressed fears that the United States "already felt the evils of incorporating a large number of foreigners into their national mass; it has served very much to divide the community and to distract our councils, by promoting in different classes different predilections in favor of particular foreign nations, and antipathies against others."[39] Although Hamilton claimed he was not calling for "a total prohibition of the right of citizenship to strangers,"[40] his comments can hardly be construed as advocating for open borders and unregulated immigration. Crucially, Hamilton's comments were solely a reaction to immigration from Europe, i.e., White immigrants. The idea of permitting non-White immigration (aside from within the hulls of slave ships), much less permitting non-White naturalization, does not to appear to have been countenanced by any of the Founders. Thus, unsurprisingly, the first permanent federal regulation of immigration, passed in 1803, punished the importation of "any . . . person of colour . . . into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited or shall prohibit the admission or importation of such . . . person of colour."[41] With regards to naturalization, Chin & Finkelman succinctly note that "everyone at the Convention would have understood that a 'uniform Rule of Naturalization' would be tied to race."[42] Thus, the 1790 Naturalization Act "discouraged the immigration of non-White people from other countries by creating legal barriers to their economic and political participation."[43]

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[37] *See* THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

[38] Alexander Hamilton, *The Examination Number VIII*, N.Y. EVENING POST, Jan. 12, 1802, *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON, July 1800–Apr. 1802, at 495 (Harold C. Syrett, ed., Columbia University Press 1977), https://founders.archives.gov/documents/Hamilton/01-25-02-0282.

[39] *Id.*

[40] *Id.*

[41] Gabriel J. Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047, 1079 n.162 (2024) (citing Act of Feb. 28, 1803, ch. 10, 2 Stat. 205). The application of the law to "any state which by law has prohibited or shall prohibit the admission or importation of such . . . person of colour" was likely done solely to comply with contemporary constitutional restrictions on the congressional power to control immigration. *See* U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight").

[42] *Id.* at 1067.

[43] *Id.* at 1057.

There exists little in the way of concrete evidence on the nationalist perceptions and beliefs of the broader public regarding American identity when the Constitution was ratified. Nonetheless, as will be seen further shortly, the phrase "the People", as used within the Constitution, was a term of art to refer to the body politic. As has been shown, the consensus viewpoint among the founding generation's political leaders confirms that they viewed the body politic in recognizably nationalistic and racial terms. According to Chin & Finkelman, "whether or not they supported slavery, a majority of [the Founders] unambiguously conceived of the United States as a White country."[44] It may be assumed that the consensus view of the founding generation's leaders on such an important, fundamental point reflected their constituents' views. Thus, under an original public meaning analysis, as under the original intent analysis, references to "the People" and "posterity" must likewise be interpreted in a nationalist light.

"The People" as Nation: *Verdugo-Urquidez* and *Heller*

Recent, powerful support for the proposition that "the People" is a phrase sounding in nationalism comes not from the realm of immigration and naturalization law, but in two cases interpreting the scope of two Bill of Rights amendments. In United States v. Verdugo-Urquidez, Chief Justice William Rehnquist applied a textualist analysis to conclude that the Fourth Amendment's reference to "the people" indicated that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government," and therefore the amendment could not "restrain the actions of the Federal Government against aliens outside of the United States territory."[45] The use of the term "the people," in contrast with the use of the term "person" or "accused" elsewhere in the Constitution, demonstrated that the phrase was a "term of art employed in select parts of the Constitution" and "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[46] To bolster this conclusion, Rehnquist also applied an originalist analysis, noting the constitutional permissibility of congressional grants of letters of marque and reprisal, to support the claim that "[t]here is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."[47]

Rehnquist's opinion in *Verdugo-Urquidez* was joined by four other justices, including Justice Anthony Kennedy. However, Kennedy also filed a concurring opinion stating that he could not "place any weight on the reference to 'the people' in

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[44] *Id.* at 1048.

[45] United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990).

[46] *Id.* at 265–66.

[47] *See id.* at 267–68.

the Fourth Amendment as a source of restricting its protections."[48] Additionally, Kennedy stated his belief that "[i]f the search had occurred in a residence within the United States, . . . the full protections of the Fourth Amendment would apply."[49] Kennedy's interpretation, in granting Fourth Amendment protection to aliens within the United States' interior, clearly diminishes the privilege of American identity and citizenship along with the exclusionary significance of the phrase "the People." Neither result is desirable under national constitutionalism, which seeks to reach decisions which emphasize and give substance to the benefits of citizenship and national belonging. On the other hand, Rehnquist's two-prong interpretation of "the people" in the Fourth Amendment (persons who belong to a national community *or* have a sufficient connection with this country to be considered a part of it) leaves much to be desired as well. The first prong is laughably non-specific. Verdugo-Urquidez was, after all, part of "a national community" (he was a Mexican citizen). Obviously, it is the *American* national community which "the People" of the Constitution belong to, and Rehnquist should have made that explicitly clear. However, this is implicitly clear in the whole opinion and as a matter of common sense.

Nebulous writing aside, Rehnquist's second prong may degrade the role of "the People" in the constitutional framework more than Kennedy's interpretation would. Suggesting that an individual might develop a sufficient connection with this country to be considered a part of the People *without* joining our national community through naturalization would give non-nationals a claim of right to participate in popular sovereignty. If non-nationals may be a part of the People, and the People are sovereign, then what grounds would exist (particularly in light of the general trend of post-World War II equal protection jurisprudence) to exclude a resident alien adult with such a "sufficient connection" from the franchise given that "sovereignty confers on the people the right to choose freely their representatives to the National Government?"[50] Such an absurd result cannot be entertained. The exclusionary roots

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[48] *Id.* at 276 (Kennedy, J., concurring).

[49] *Id.* at 278.

[50] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 794 (1995) (acknowledging "the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government.") (citing Powell v. McCormack, 395 U.S. 486, 541 n. 76 (1969)). *See also* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right To Vote?*, 75 MICH. L. REV. 1092, 1136 (1977) (concluding that the denial of the right to vote to resident aliens "can only be justified on the basis of some compelling state interest" and "it is far from clear that it can, in fact, be justified under that exacting standard"). *Compare* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."), *with* Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that "a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause"), *and In re Griffiths* 413 U.S. 717, 729 (1973) (holding that conditioning bar admission on citizenship violates the Equal Protection Clause). That individuals like Rosberg advocate for the extension of the franchise to aliens proves that national constitutionalist jurists must be cautious with their language and not permit an opening for anti-national constitutionalists to continue their assault on the sanctity of the

of American identity, the traditional importance of citizenship and the franchise in our political process, and the fact that (unlike citizens) aliens may be expelled at the whim of the federal government,[51] all suggest that aliens are second-class persons under the Constitution. It is the duty of judges, empowered by the truly sovereign American people, to ensure that aliens remain second-class persons under the Constitution and are prevented from exercising any right which properly belongs to the People alone until they are naturalized—if they are naturalizable.

Rehnquist also failed to describe the identity of the People and the national community that they belong to. However, in District of Columbia v. Heller the Court, in an opinion by Justice Antonin Scalia, directly acknowledged the historical, racial, and exclusionary identity of the People to support holding that the Second Amendment's right to bear arms is an individual right belonging to all of the People. Scalia first explained that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset" and then cited the two-prong definition of the People provided in *Verdugo-Urquidez* in support of this conclusion.[52] Later in the opinion, Scalia cited two antebellum state court cases "holding that the Constitution did not extend to free blacks"[53] in order to show that in the early 19th century many state courts "indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions."[54] Notably, Scalia made no effort to criticize these opinions' holding that Blacks did not possess the right to bear arms. In arguing that the Second Amendment applies to all of the People and citing these antebellum cases in support of his reasoning, Scalia implicitly acknowledged that in the antebellum period Blacks were not a part of the People. Incredibly, 151 years after *Dred Scott*, five members of the Court (with no member undercutting or qualifying the opinion's analysis in a

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People, their privileged citizenship, and their sovereignty. On the other hand, it may be possible that Rehnquist felt required to include this second prong (which, given the basis for the opinion's holding, is essentially dictum) to secure the votes for his opinion. Notably, elsewhere in the opinion, Rehnquist implies that criminal infiltrators may not be entitled to the same level of Fourth Amendment protection as citizens, and any cases whose holdings assumed that they were entitled to equal Fourth Amendment protection would be inapposite were the issue directly before the court. *See Verdugo-Urquidez*, 494 U.S. 259, 272 (stating that prior decisions are "not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us"). Nonetheless, Rehnquist seems to concede that lawful resident aliens have Fourth Amendment rights. *See id.* at 270–71. This was an unwise and anti-national constitutionalist concession given that lawful resident aliens, being unnaturalized (and potentially unnaturalizable), are not a part of the People, and the text of the Fourth Amendment plainly does not provide protections to those who are not a part of the People.

[51] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

[52] District of Columbia. v. Heller, 554 U.S. 570, 580 (2008)

[53] *Id.* at 611 (citing Aldridge v. Commonwealth, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen.Ct.); Waters v. State, 1 Gill 302, 309 (Md.1843))

[54] *Id.*

concurring opinion) ostensibly vindicated the legal correctness of Chief Justice Roger Taney's ruling that Blacks "formed no part of the people who framed and adopted [the Declaration of Independence]"[55] and were not a part of "the sovereignty of the States"[56] or the sovereignty of the country as a whole, which led Taney to conclude Blacks "had no rights which the white man was bound to respect."[57]

National Constitutionalism Distilled for Jurists

The foregoing analysis indicates that national constitutionalism relies on three primary points. First, national constitutionalism promotes and guards popular sovereignty. Second, national constitutionalism relies on the distinction between the superior constituent power of the sovereign People and the inferior constituted power of the Constitution and government (the principal-agent analogy). Third, the People share a biological relation describable by reference to the original understanding of who formed the People—and who could be permitted to enter the ranks of the People—in and about the time the Constitution was ratified. However, some additional, derivative points must be expounded before national constitutionalism is applied further.

As a consequence of acknowledging popular sovereignty, national constitutionalism additionally adopts as a central tenet the principle that "[b]ecause . . . agents derive their authority entirely from the existing constitution, they implicitly lack the authority to destroy or replace the source of that power."[58] Moreover, national constitutionalism is proudly a results-oriented species of jurisprudence. Similar to Dworkin's moral reading of the Constitution, a national reading of the Constitution (or of any language at issue) must be done in the light which "does most credit to the nation" and the People because courts act as the People's agents.[59] Specifically, a reading which degrades the power or privilege of the People is impermissible in light of the implicit limitation on agents whereby they may not destroy or replace the source of their power. This is especially true when an alternative reading, no matter how strained, would not degrade the power or privilege of the People. But when an alternative reading is completely impossible (which due to the nationalist beliefs of the Founders will likely only occur when interpreting the language of a statute or a constitutional amendment), that language should be deemed unconstitutional.

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[55] Dred Scott v. Sandford, 60 U.S. 393, 410 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[56] *Id.* at 419.

[57] *Id.* at 407.

[58] Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. UNIV. L. REV. 65, 79 (2019).

[59] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996). *See also* League v. De Young, 52 U.S. 185, 203 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States.").

Relatedly, national constitutionalism adopts Schmitt's distinction between the Constitution as a whole and its component provisions.[60] The Constitution is the People's authorization for the use of power by the governmental agent for the benefit of the People and the terms upon which that power is to be exercised. If an individual constitutional provision would prevent the effective, beneficial exercise of power by government on behalf of the People, particularly when the would-be exercise of power is directed at those who are not a part of the People, judges should consider permitting a necessary, limited exception to the individual provision, at least in times of emergency. This distinction between constitutional provision and the Constitution *in toto* is textually justified, because judges must constitutionally take an oath only "to support this Constitution," not to always support every single one of its provisions.[61]

National Constitutionalism Applied to Immigration Policy, Naturalization Law, and Alienage Classifications

In 1870, the privilege of naturalization was extended to "to aliens of African nativity and to persons of African descent," [62] although foreign Blacks continued to face difficulties immigrating in practice.[63] However, since the second half of the 20th century, mass immigration—both "legal" and illegal—has challenged the sovereignty and demographic security of the People in an increasingly severe and unprecedented way. In 1940 the United States was 89.8% White.[64] In 1952, the United States government removed racial restrictions on naturalization in response to foreign policy concerns but maintained a national quota system which de facto discriminated against non-White immigration.[65] In 1965, the Immigration and Naturalization Act (Hart-Celler) removed the national quota system that prevented mass non-White immigration. That act, in addition to contemporaneous collapses in border security, is in large part responsible for setting America on the path to becoming a minority-White country by 2043.[66] Criminal infiltration of the southern border has drastically

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[60] *See* SCHMITT, *supra* note 1, at 158 (arguing that "[p]rotection of the constitution and protection of every single constitutional provision are no more identical with one another than are the inviolability of the constitution and that of every single constitutional provision" because "[w]hen every single constitutional provision becomes 'inviolable' . . . the protection of the constitution in the positive and substantial sense is sacrificed to the protection of the constitutional provision in the formal and relative sense" which would make "the individual constitutional provision . . . an insurmountable obstacle to an effective defense of the constitution").

[61] U.S. CONST. art. VI, cl. 3.

[62] *See* Chin & Finkelman, *supra* note 41, at 1102.

[63] *See id.* at 1102, n.313.

[64] Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States,* 19 tbl. 1 (U.S. Census Bureau, Working Paper No. 56, 2002).

[65] *See id.* at 1110.

[66] *See* Gabriel J. Chin & Douglas M. Spencer, *Did Multicultural America Result from a Mistake - The 1965 Immigration Act and Evidence from Roll Call Votes*, 2015 UNIV. ILL. L. REV. 1239, 1242 (2015) (citing Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower

increased in recent years, further accelerating the People's dispossession.[67] Moreover, the application of equal protection principles to both lawful immigrants and criminal infiltrators, in addition to the Court's interpretation of the Fourteenth Amendment's Citizenship Clause, has further complicated the immigration question by blocking legal avenues for disincentivizing undesirable immigration and removing undesired immigrants. The challenge non-White immigration and naturalization pose to the sovereignty of the People represents a constitutional emergency our Founders seemingly never anticipated. This emergency threatens to overturn the Constitution itself by turning American government against the People and securing government's benefits primarily for other peoples and their posterity.

There are multiple areas where national constitutionalism should be applied by courts to rescue the People from this emergency. First, courts should give effect to the Constitution's Guarantee Clause and order the federal government to secure our borders against criminal infiltrators and the transnational criminal organizations which bring those infiltrators (and other contraband) into the country's interior. Second, courts should subject immigration and naturalization laws to judicial review and apply strict scrutiny to those laws permitting non-White immigration and naturalization. Third, courts should stop applying equal protection to laws discriminating against criminal infiltrators and apply rational basis review to alienage classifications discriminating against lawful immigrants. Finally, courts should not only reconsider constitutional birthright citizenship for children of immigrants who are citizens or subjects of another country, but they should challenge the constitutionality of the Fourteenth and Fifteenth amendments altogether.

Border Control, the Guarantee Clause, and the State War Power

To give states legal tools to fight back against criminal infiltration, courts should give broad effect to claims for relief which demand that the federal government secure the border pursuant to the Guarantee Clause or, alternatively, recognize the permissibility of exercising the State War Power.

One of the few affirmative duties placed upon our federal government by the Constitution is the requirement that it "protect each [state] against Invasion."[68] Utilizing an original intent analysis, Dwyer describes the clause's "protection against invasion as providing security against 'foreign hostility' and 'ambitious or vindictive

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Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), https://www.census.gov/newsroom/releases/archives/population/cb12-243.html); AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL 184 (2014) (noting that "all types of immigration from Latin America rose after 1965: temporary and permanent, legal and illegal").

[67] Ashley Wu, *Why Illegal Border Crossings Are at Sustained Highs*, N.Y. TIMES (Oct. 29, 2023), https://www.nytimes.com/interactive/2023/10/29/us/illegal-border-crossings-data.html (showing that the three years with the greatest number of annual southwestern border apprehensions in the 21st century occurred in 2021, 2022, and 2023).

[68] U.S. CONST. art. IV, § 4.

enterprises'" which includes the activities of criminal smugglers.[69] Dwyer concludes her analysis of the meaning of the word "Invasion" in the Guarantee Clause by breaking it down into three elements: "1) a hostile and organized external force 2) conducting a purposeful intrusion on sovereign land 3) in furtherance of a predetermined malicious objective."[70] Although, Dwyer unwisely concedes that "illegal immigration in and of itself" does not amount to invasion,[71] she convincingly argues that the activities of Mexican drug cartels—including the smuggling of criminal infiltrators—do amount to invasion.[72]

Dwyer's analysis strongly suggests that the federal government is obliged to defend the nation from this invasion. Ordering government to affirmatively implement a judicially crafted policy which government had heretofore been unwilling to implement is not outside the ken of the judiciary.[73] Thus, courts should order the federal government to militarize the border, begin construction of border defenses and barriers, and issue arrest or shoot to kill orders targeting criminal infiltrators at the border. These policies would undoubtedly defeat the invasion, or at least diminish its scope and force. Likewise, courts should order the federal government to root out and deport criminal infiltrators in the interior. Additionally, Dwyer suggests an alternative: courts should uphold state policies—enacted pursuant to the State War Power—aimed at defeating the invasion against federal Supremacy Clause challenges.[74] Once exercising the State War Power is deemed justified, it should be given a plenary scope, including the authority to deport criminal infiltrators within their states.[75]

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[69] Heather Dwyer, *The State War Power: A Forgotten Constitutional Clause*, 33 UNIV. LA VERNE L. REV. 319, 323 (2012) (citing THE FEDERALIST NO. 43 (James Madison)).

[70] *Id.* at 325.

[71] *Id.* at 339. Criminal infiltrators express hostility towards our laws through their infiltration, are organized insofar as they must prepare for their crime, purposefully intrude on our territory, and do so in furtherance of the malicious objective of living among us without authorization (at minimum); thus, per Dwyer, they are invaders.

[72] *Id* at 342–352 (concluding that border states are "quite literally under invasion by drug cartels").

[73] *See generally* Cooper v. Aaron, 358 U.S. 1 (1958) (requiring Arkansas to implement a judicially approved school integration plan); Swann v. Charlotte-Mecklenburg *Bd. of Ed.*, 402 U.S. 1 (1971) (permitting lower courts to order adherence to a judicially formulated school bussing schemes for the purpose of integration). *See also* Relman Morin, *AP Was There: Paratroops with bayonets escort Little Rock 9*, AP News (Sept. 24, 2017, 11:21 AM), https://apnews.com/article/360439e805eb4db180fbfd52a7a0f5bb (describing how "[h]ardened paratroopers, in battle dress and with bayonets at the ready" were used to forcibly integrate Little Rock Central High School in Arkansas during the 1957-58 school year).

[74] Dwyer, *supra* note 69, at 319 (describing the State War Power as "both antecedent to, and affirmatively acknowledged in, the Constitution in Article I, section 10, clause 3 which states, "No State shall, without the Consent of the Congress . . . engage in War, *unless actually invaded*") (emphasis in original). *See also id.* at 355 ("This power is independent from federal action or approval and cannot be expunged by a Supremacy claim.").

[75] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (noting that exercise of "the war power" is "largely immune from judicial inquiry or interference").

Furthermore, although she rejects the approach, Dwyer also conducts an original public meaning analysis, noting that "modern definitions of the word invasion" include "aggression, assault, attack, encroachment, foray, hostile entry, incursion, infiltration, and intrusion" and that "etymological research of the term reveals that the meaning has not changed since at least the fifteenth century."[76] This definition would seem to be broader, encompassing all forms of criminal infiltration (not merely those of smugglers and cartel groups), and therefore permit more claims of relief or permissible uses of the State War Power to combat criminal infiltration. Given that crafting law to most effectively combat criminal infiltration is a clear goal of national constitutionalism, jurists subscribing to the theory should aim to define "Invasion" under its original public meaning.

Immigration and Naturalization Law

The principles of national constitutionalism have a relatively straightforward application to immigration and naturalization law. If the government may not destroy or replace the People, or otherwise usurp their sovereignty (or permit their sovereignty to be usurped), and if the People are an identifiable, substantive, and organic legal entity (and not merely the statistical collection of all people within the United States), then government power to permit immigration or naturalization is not plenary. National constitutionalism therefore advocates subjecting to judicial review—with the highest level of scrutiny—all attempts by the federal government to "dissolve the people and elect another"[77] through immigration and naturalization policies which have the effect of altering the traditional, racial demographic balance of the United States and thereby degrading the People's power and privileges. Accordingly, Taney's dictum in *Dred Scott* that Congress "may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another Government"[78] is anathema to the implicit limitations, entailed by popular sovereignty, placed upon the constituted power of the nation-state and should be rejected as a matter of law.

The effect of this would simply be a return to the pre-1870 status quo whereby only Whites could typically immigrate and seek naturalization.[79] Non-Whites would

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[76] *Id.* at 323 (citing ROBERT BARNHART, THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY: THE ORIGINS OF AMERICAN ENGLISH WORDS 397 (1995)).

[77] Bertolt Brecht, *The Solution* (1959), *reprinted in* BERTOLT BRECHT POEMS 1913-1956, 440 (John Willett and Ralph Manheim, eds., Methuen 1976).

[78] 60 U.S. at 419.

[79] This is a historically workable standard. *See generally* IAN HANEY LOPEZ, WHITE BY LAW 2–7 (2006) (describing various court cases in American history aimed at determining if the petitioner was White, and explaining how "[t]hough the courts offered many different rationales to justify the various racial divisions they advanced, two predominated: common knowledge and scientific evidence"). The use of artificial intelligence presents another possible method for determining race. *See generally* Judy Wawira Gichoya et al., *AI recognition of patient race in medical imaging: a modelling study*, 4 LANCET DIGIT. HEALTH e406 (finding "that AI can accurately predict self-reported race, even from corrupted, cropped, and noised medical images, often when clinical experts cannot"). Needless to say, Congress did not abandon the 1790 rule because it proved impossible to determine who was White.

still be able to visit the U.S. without becoming residents, as tourism is not immigration. Moreover, if immigration and naturalization laws are subjected to strict scrutiny, then some exceptionally talented non-Whites, who possess skills or knowledge possessed by very few natives, may yet be permitted to immigrate provided their skills or knowledge and presence in the country are necessary for furthering a compelling governmental interest.[80] However, courts should ensure that the compelling governmental interest is very compelling. The immigration of a non-White scientist who can demonstrably contribute towards curing cancer through research only he can conduct (and which can only be effectively conducted in America) would be one such compelling interest, but a purported need to import non-White menial labor is not compelling at all. Moreover, under this framework non-White immigration should never lead to naturalization, as naturalization is almost certainly unnecessary and thus would not comport with policy being narrowly tailored.

Alienage Classifications and the Citizenship Clause

In line with national constitutionalism's goal of returning prestige and privilege to American citizenship, and pursuant to the principle that the Constitution is to be given the reading that best serves the nation, alienage classifications affecting criminal infiltrators and relating to the provisioning of government benefits and employment opportunities should no longer be subjected to equal protection analysis. The Court's decision in Plyler v. Doe[81] should be overruled posthaste. Once *Plyler* is consigned to the dustbin of history, the State War Power is recognized, and immigration and naturalization laws are subjected to strict scrutiny, states will be free to enact laws like that at issue in *Plyler* and like California's Proposition 187,[82] which was deemed unconstitutional on Supremacy Clause grounds,[83] to disincentivize criminal infiltration and lessen its pernicious effects on the public purse. Moreover, because lawful aliens have no fundamental right to be in the country and are not citizens, they should be denied a constitutional right to travel.[84] Thus, alienage classifications impacting lawful aliens—including restrictions on their entry

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[80] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 532 (2022) (stating that policy can only survive strict scrutiny upon a showing that the policy "serve[s] a compelling interest and [is] narrowly tailored to that end") (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, n.1 (1993)).

[81] Plyler v. Doe, 457 U.S. 202 (1982) (holding that a state's refusal to fund the education of unlawfully present children of criminal infiltrators had no rational basis and was thus unconstitutional).

[82] *See* Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L. J. 989, 990 (1995) (stating that Proposition 187's "most controversial provisions would bar anyone who is not a citizen, a legal permanent resident, or a legal temporary visitor from receiving public social services, health care, and education").

[83] *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

[84] *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.") (citing *Passenger Cases*, 7 How. 283, 492 (1849)).

into a state—should be subject to mere rational basis review and enjoy a presumption of constitutionality.

National constitutionalists should also endeavor to overturn the holding in United States v. Wong Kim Ark, establishing the rule of birthright citizenship for the children of most foreign nationals born on U.S. soil. As pointed out in Chief Justice Melville Fuller's dissent in *Wong Kim Ark*, the Citizenship Clause's qualifier "and subject to the jurisdiction thereof" can be read as synonymous with the words "and not subject to any foreign power" which would exclude from birthright citizenship, as the dissent argued was originally intended, "the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct."[85] This reading would give more prestige to the concept of American citizenship and membership within the People, which was originally conceived of as a group possessing common blood (but not necessarily common birthplaces). At minimum, courts should limit *Wong Kim Ark*'s holding, as the Tenth Circuit properly did in 2021 when it decided to apply the *Insular Cases* instead of *Wong Kim Ark* to hold that birthright citizenship did not inure in those born in U.S. territories.[86] Moreover, courts should adopt Judge Richard Posner's view that providing birthright citizenship to children of criminal infiltrators born in the United States is not constitutionally mandated.[87] Indeed, if those children are non-Whites, then courts should move to categorically prevent that grant of citizenship.

Finally, courts should also begin to question the constitutionality of the Fourteenth and Fifteenth amendments as a whole, for two reasons. First, these amendments were ratified contrary to the Article V process. Suthon Jr. notes the military occupation of the south during Reconstruction, the forcible reorganization of

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[85] United States v. Wong Kim Ark, 169 U.S. 649, 719–22 (1898) (Fuller, C.J., dissenting) (relying on the use of the words "and not subject to any foreign power" by the 1866 Civil Rights Act, which was passed by the same Congress which passed the Fourteenth Amendment, in granting citizenship to those born on U.S. soil; and relying on statements by Senators Trumbull and Johnson that the qualifier excludes the children of those "owing allegiance" or "subject to some foreign power" from citizenship). *But see* Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 736 (2015) (endorsing the *Wong Kim Ark* holding and advocating for its extension to children of criminal infiltrators born in the U.S., but conceding that "because the [Citizenship] Clause constitutionalized the citizenship provision in the Civil Rights Act of 1866, we can therefore impute that provision's expected applications to the Clause itself").

[86] *See* Fitisemanu v. United States, 1 F.4th 862, 871 (10th Cir. 2021), *cert. denied*, 143 S.Ct. 362 (2022).

[87] *See* Oforji v. Ashcroft, 354 F.3d 609, 619–21 (7th Cir. 2003) (Posner, J., concurring) (arguing that "Congress should rethink . . . awarding citizenship to everyone born in the United States . . . including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children," noting that "the purpose of the [Citizenship Clause] was to grant citizenship to the recently freed slaves, and the exception for children of foreign diplomats and heads of state shows that Congress does not read the citizenship clause of the Fourteenth Amendment literally," and concluding that "Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense").

the occupied states' governments, and the requirement that the southern states ratify these amendments before the occupation was lifted and their elected representatives would be accepted into Congress "constitute[d] an infraction of the amendment procedure ordained by Article V of the Constitution."[88] Second, the amendments are substantively unconstitutional. If, as Albert argues, the Fourteenth and Fifteenth amendments represent a "constitutional dismemberment" which "is incompatible with the existing framework of a constitution because it seeks to achieve a conflicting purpose," then Article V would not permit such Amendments to be made, given that Article V only permits for "mere amendment[]."[89] Albert views the Fourteenth and Fifteenth Amendments as writing "into the Constitution a ringing declaration of the equality of all persons,"[90] and the Court has explicitly held the former amendment prohibits "measures designed to maintain White Supremacy."[91] However, given that the United States was founded as a race-based nation-state for the preservation and betterment of White Americans (the People), as clearly laid out in the Preamble and revealed by our history, it is difficult to see how these amendments (or at least the way they have been interpreted in the post-World War II era) do not amount to unconstitutional, revolutionary usurpations by the constituted government power.

Conclusion

Our Constitution will survive only if "the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom."[92] One of those principles, accepted by our Founders who as a whole "unambiguously conceived of the United States as a White country,"[93] was nationalism—specifically, racial nationalism. If we abandon that principle while turning over America to a non-White majority, a majority that will not share a common, historic commitment to anything, what else shall we abandon along the way? If non-Whites believe that America's White nationalist founding "deserves a place of dishonor"[94] in our history, then—given the fundamentality of this principle

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[88] *See generally* Walter J. Suthon Jr., *Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22, 41–44 (1953). *See also id.* at 29 (contrasting this process with the regular process used to ratify the Thirteenth Amendment).

[89] *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 4–5 (2018); *see also* Sanford Levinson, *Accounting for Constitutional Change*, 8 Const. Comment. 409, 414–15 (citing Representative Boutwell, a "warm supporter" of the Thirteenth Amendment, who conceded that "the amendment power was not unlimited" and "suggested that article V did not authorize amendments that would 'establish slavery, or . . . invite the King of Dahomey to rule over this country' insofar as they would contravene the purposes of the Constitution as laid out in the Preamble").

[90] *Id.* at 4.

[91] *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

[92] *See* Chavez v. Martinez, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part).

[93] Chin & Finkelman, *supra* note 41, at 1048.

[94] *See Id.*

in the original constitutional framework—what is to stop any other constitutional provision from being similarly repudiated?

The Supreme Court and inferior federal courts have the power to arrest the dispossession of White America. All they must do is substitute bad landmark precedent for good landmark precedent. Failure to do so is not judicial humility, but, at best, judicial surrender in the face of a terrible crime. At worst, it is complicity in that crime. The People cannot be expected to meekly swallow this demographic assault on their sovereignty. If the People are not granted relief from the government—which includes the judiciary—then, if they are to survive as masters in the land of their ancestors, they must exercise "their revolutionary right to dismember or overthrow" the government.[95] And that will be a process which no deskbound jurist can gleefully look forward to; for it will be a controversy decided not by the careful balance of Justitia's scales, but by the gruesome slashing of her sword.

[95] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.